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COURT OF CRIMINAL APPEALS
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**IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN**

**THE STATE OF TEXAS,
Petitioner**

v.

**KEVIN CASTANEDANIETO,
Respondent**

*From the Court of Appeals for the
Fifth District of Texas at Dallas
In cause Numbers 05-18-00870-CR,
05-18-00871-CR, and 05-18-00872-CR*

STATE'S BRIEF ON THE MERITS

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Criminal District Court Number Six
Dallas County, Texas

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas respectfully submits this brief on the merits on this Honorable Court's grant of discretionary review of the opinion of the Dallas Court of Appeals.

STATEMENT OF THE CASE

The State charged Appellee Kevin Castanedanieto with three aggravated robberies arising from the same transaction. (CR1: 10; CR2: 9; CR3: 9).¹ *See* Tex. Penal Code Ann. § 29.03(a)(2). Appellee filed pretrial motions in cause numbers F17-57212-X and F17-57213-X, requesting a hearing prior to the introduction of any statements he allegedly made.² (CR1: 58; CR2: 57). On July 30, 2018, the trial court heard evidence and arguments on the pretrial motions. (RR: 10). After the trial court granted the motion to suppress, the State filed a motion for reconsideration. (CR1: 83). The trial court denied the State's motion and signed the order granting Appellee's suppression request the next day. (CR1: 107; CR2: 82 CR3:30; RR: 49). The trial court did not issue findings of fact and conclusions of law.

The State filed a timely notice of appeal, and on October 3, 2019, the Dallas Court of Appeals affirmed the trial court's ruling. (CR1: 108; CR2: 84; CR3: 27); *State v. Castanedanieto*, Nos. 05-18-00870—872-CR, 2019 WL 4875340, at *1 (Tex. App.—

¹ The clerk's records are designated as "CR1" for trial court cause number F17-57212-X (appellate cause number 05-18-00870-CR); "CR2" for trial court cause number F17-57213-X (appellate cause number 05-18-00871-CR); and "CR3" for trial court cause number F18-00407-X (appellate cause number 05-18-00872-CR).

² Appellee did not file any pretrial motions in trial court cause number F18-00407-X.

Dallas Oct. 3, 2019), *rev'd*, 607 S.W.3d 315 (Tex. Crim. App. 2020) (*Castanedanieto I*). This Court granted the State’s petition for discretionary review on February 12, 2020. On September 16, 2020, the Court reversed the court of appeals’ decision and remanded the case for further analysis. *State v. Castanedanieto*, 607 S.W.3d 315, 330 (Tex. Crim. App. 2020) (“The court of appeals has not addressed the theories of law that [Appellee] presented to the trial court.”) (*Castanedanieto II*).

On remand, the court of appeals again affirmed the trial court’s ruling. *Castanedanieto v. State*, Nos. 05-18-00870—872-CR, 2021 WL 972901, at *1, 7 (Tex. App.—Dallas Mar. 16, 2021, pet. granted) (mem. op. on remand, not designated for publication) (*Castanedanieto III*). The State again filed a petition for discretionary review on April 14, 2021; on June 30, 2021, this Court granted the State’s petition for discretionary review.

GROUND FOR REVIEW

Contrary to this Court’s prior decision in this case, the court of appeals expressly defied the ordinarily applicable rules for examining a waiver of a defendant’s rights under *Miranda* and article 38.22 of the Texas Code of Criminal Procedure by applying the “cat out of the bag” coercion theory to Castanedanieto’s claim that his second police interrogation waiver was unknowing.

STATEMENT OF FACTS³

A. The Interviews

1. First Police Interview

Appellee was arrested for aggravated robbery in the early morning hours of August 10, 2017. At the time of arrest, Appellee was eighteen years old and had emigrated from El Salvador five years earlier. Shortly after arrest, around 3:00 a.m., he was interviewed by Detective Thayer.⁴ This interview was video recorded.⁵ During the first several minutes of the interview, the detective elicited personal information from Appellee and conveyed warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and article 38.22 of the Texas Code of Criminal Procedure:

DETECTIVE: I've been working on this case. Kind of a mess, huh? Kind of a mess. We'll talk about it here in a minute. Let me just find out a few things about you. Where are you from?

APPELLEE: Where am I from?

DETECTIVE: Mhmm.

APPELLEE: I'm from El Salvador.

DETECTIVE: From where?

APPELLEE: El Salvador.

DETECTIVE: You said San Salvador?

³ Other than the section regarding the court of appeals' March 16, 2021 opinion on remand, the State's Statement of Facts is taken from this Court's prior opinion in this case with only minor, nonsubstantive changes. See *Castanedanieto II*, 607 S.W.3d at 317-26.

⁴ Detective Thayer's first name is not reflected in the record.

⁵ The record includes electronic copies of the interviews, but it does not include a transcript.

APPELLEE: Where I'm born?

DETECTIVE: Yeah, where were you born?

APPELLEE: In El Salvador.

DETECTIVE: Okay and when did you come here?

APPELLEE: 5 years ago.

DETECTIVE: 5 years ago? Take your arms out of your shirt for me.

APPELLEE: Sorry, it's 'cause it's cold.

DETECTIVE: It's ok. It's a respect thing though right? Because we're going to have a conversation and we're going to be truthful with each other. So you came over here five years ago, did you come with family?

APPELLEE: No I just came by myself, because my mom married to my step-dad and then my step-dad asked for me. So they fix the papers for me and I came here.

DETECTIVE: So you are how old?

APPELLEE: 18.

DETECTIVE: 18, so you came here 5 years ago. Did you go to school?

APPELLEE: Yes, sir.

DETECTIVE: Did you graduate?

APPELLEE: *Shakes head no*

DETECTIVE: Didn't graduate?

APPELLEE: No, almost.

DETECTIVE: What about a job? Do you have a job?

APPELLEE: I used to work on air conditioners.

DETECTIVE: On air conditioners? Who did you work with?

APPELLEE: Um, quality.

DETECTIVE: Okay, so do you have a job now?

APPELLEE: Not right now.

DETECTIVE: Not right now, okay. How about brothers and sisters?

APPELLEE: I just got one sister.

DETECTIVE: One sister?

APPELLEE: She's not here.

DETECTIVE: She's back—

APPELLEE: She's in Salvador.

DETECTIVE: Who do you live with?

APPELLEE: I was living with my grandma in Garland.

DETECTIVE: Your grandma in Garland? What's her name?

APPELLEE: Yolanda.

DETECTIVE: Yolanda?

APPELLEE: Yeah.

DETECTIVE: Do you know the address?

APPELLEE: No, because she already moved from Garland. I don't know where she lives.

DETECTIVE: You don't know where she moved to?

APPELLEE: No.

DETECTIVE: So you lived with her but you don't—

APPELLEE: No, because we was living with my uncle, me, my two cousins, and my gran. And she moved, so I just lived with my uncle.

DETECTIVE: So do you stay with your uncle now?

APPELLEE: Mhmm.

DETECTIVE: Where does he stay at? Garland?

APPELLEE: Yes.

DETECTIVE: What's the address?

APPELLEE: I don't know the address, but he lives off of Walnut Street.

DETECTIVE: Walnut Street? Walnut Hill or Walnut Street?

APPELLEE: Walnut Street.

DETECTIVE: Walnut Street. Okay. Well before I can talk to you about what happened tonight, I have to read you your rights. Do you watch TV at all? Like cop shows or—

APPELLEE: Yeah.

DETECTIVE: Okay. Well I'm going to read these to you. You have the right to remain silent and not make any statement at all, and any statement you make may be used against you at your trial. Any statement you make may be used as evidence against you in court. You have the right to have a lawyer present to advise you prior to and during any questioning. If you're unable to employ a lawyer, you have the right to have a lawyer appointed to advise you prior to and during any questioning. And you have the right to terminate the interview at any time. Do you understand the rights I have read to you?

APPELLEE: *Shakes hand so/so*

DETECTIVE: A little bit? Okay—Well are you—

APPELLEE: It's just 'cause I don't speak a lot of English.

DETECTIVE: Can you read Spanish?

APPELLEE: Yes.

DETECTIVE: Okay, read that for me and tell me if you understand.

APPELLEE: [Reads rights out loud in Spanish]

DETECTIVE: Okay, do you understand?

APPELLEE: *Nods affirmatively*

DETECTIVE: Okay. Are you willing to talk to me—

APPELLEE: Um—

DETECTIVE —and try to figure this all out?

APPELLEE: It's 'cause—um—I don't understand.

DETECTIVE: Okay, let's talk about what happened tonight.

APPELLEE: Yes, sir.

DETECTIVE: Okay. You know you're in some trouble, huh?

APPELLEE: I know.

DETECTIVE: You know. You made some bad decisions tonight.

APPELLEE: That's because, um, I don't know why I did that.

DETECTIVE: You don't know why you did it?

APPELLEE: It's because—Let me tell you the truth.

DETECTIVE: Okay. That's good, tell me the truth.

Detective Thayer and Appellee then proceeded with the rest of the interview. During the interview, Appellee mentioned being “fucked up” because he was “doing drugs.” When asked what kind of drugs, Appellee responded, “weed and cocaine.” When asked how long ago he had used cocaine, Appellee asked what time it was, and when told it was almost four in the morning, responded that he used cocaine at “eleven.”

2. Arraignment

That evening, Appellee was brought before a magistrate for arraignment. According to the arraignment sheet, the magistrate informed Appellee of a number of rights and warnings, including those required by *Miranda*:

I have in clear language informed the person arrested of the accusation against him and of any Affidavit filed herewith, and of his right to retain counsel, and of his right to the appointment of counsel if he is indigent and cannot afford counsel, and of his right to remain silent, and of his right to have an attorney present during any interview with peace officers or attorneys representing the State, and of his right to terminate the interview at any time, and of his right to have an examining trial. I informed the person arrested that he does not have to make any statement at all, and that any statement made by him may be used in evidence against him on his trial for the offense concerning which the statement is made. I informed the person arrested that reasonable time and opportunity would be allowed him to consult counsel and of his rights to bail if allowed by law. I also informed the person arrested that if he is not a citizen of the United States that he may have the right to contact consular officials from his country and that if he is a citizen of certain countries that consular officials would would [sic] be notified of this arrest without further action required on his part.⁶

When asked whether he wanted an appointed lawyer, Appellee informed the magistrate that he did. The next day Appellee was appointed an attorney, but that attorney declined representation. Three days later, Appellee was appointed the attorney who represented him at the motion to suppress hearing.

3. Second Police Interview

The next evening, August 11, Detective Olegario Garcia went to the jail and asked Appellee if he would come to police headquarters for an interview. Appellee agreed. Detective Garcia brought food from McDonald's and left Appellee in the interrogation room to eat before the interview started. When the detective came

⁶ The record indicates that the magistrate notified the El Salvador consulate of the charges against Appellee.

back, he joked that Appellee was eating the burger slowly. Appellee responded, “It’s probably the last hamburger I’m going to eat. I hope not, but I don’t know.”

Detective Garcia responded, “It will not be the last hamburger you eat man, so don’t worry about that. Alright, just want to get some basic stuff out of the way.”

Detective Garcia then began by eliciting basic identifying information (name, address, date of birth), asking about family members, and inquiring about life in El Salvador. Then he turned to the subject of answering questions, and conveyed warnings required by *Miranda* and Article 38.22:

DETECTIVE: Alright, basically we’re going to go over everything that you talked about with the other Detective and now that you’ve had a couple days to think about stuff maybe you might remember something that you didn’t or you might have some questions of your own for me that I’ll try to answer, okay? If I don’t know the answer, I’ll tell you. And if I do, you know I’ll be honest with you and give you the information. Okay?

APPELLEE: I’m gonna do the same, ask me anything you want. I’ll tell you, I’m going to tell you the truth.

DETECTIVE: Alright, [the other detective] read this to you. But everybody who comes in here, we read this to you. You have the right to remain silent and not make any statement at all and any statement you make may be used against you at your trial. Any statement you make may be used against you as evidence in court. You have the right to have a lawyer present to advise you prior to and during any questioning. If you’re not able to employ a lawyer you have the right to have a lawyer appointed to you to advise you prior to or during any questioning, and you have the right to terminate the interview at any time. Do you understand the rights I read to you?

APPELLEE: Yes, sir.

DETECTIVE: Alright, are you willing to talk to me about, basically going over everything?

APPELLEE: Yeah, I'm gonna tell you—I'm gonna start by basically saying what it was I was doing.

Detective Garcia and Appellee then proceeded with the rest of the interview.

B. Motion to Suppress

1. Written Pleading

Defense counsel filed an omnibus pretrial motion, which included the following sentence: “Defendant requests a hearing prior to the introduction of any statements allegedly made by the Defendant, either orally or in writing, to determine the admissibility of same. TEX. CODE CRIM. PROC. ANN. article 38.22, 38.23.”

2. Defense Counsel's Initial Oral Claims

At the suppression hearing, defense counsel initially claimed that the statements from the first interview should be suppressed because Appellee “didn’t demonstrate a full awareness of the rights he was waiving and [the] meaning of the waiver of those rights.” As for the statements from the second interview, counsel stated that “we carry 1 over to number 2, but additional grounds for number 2 is the State reinitiated contact, not the defendant, and therefore” the statements from the second interview were inadmissible.

3. State's Witness

The State responded that it sought to admit only the statements from the second interview. In support of its position, the State called Detective Garcia, the sole live witness at the suppression hearing. The prosecutor asked him if he had “any issues communicating” with Appellee between the jail and police headquarters. Detective Garcia answered, “No.” When asked what he did to make sure the two of them understood each other in the interview room, the detective responded that he did so by “just getting basic information,” such as name and address and other common information to “break the ice” and build rapport. When asked whether any of his questions were designed to help him understand Appellee’s education level and language skills, Detective Garcia answered affirmatively and said, “He was able to spell the street that he lived on. His pronunciation seemed well. I personally don’t speak Spanish at all, so I was able to understand everything he was saying.” When asked if Appellee ever switched to Spanish, the detective responded, “No.”

Turning specifically to the recorded interview, the prosecutor asked the detective if he ever had any concerns that Appellee was not understanding him. Detective Garcia answered, “No, I felt like he understood what I was saying.” When asked if that was based on “language, education level, mental acuity,” the detective responded that it “seemed like he understood what I was saying, was able to respond properly to the questions I was asking. He had an understanding of slang words, you

know. I think that showed me he was ingrained into the culture here in the United States.” When asked for an example of the slang Appellee used, Detective Garcia noted that Appellee used the word “strap” to describe a gun. Detective Garcia further testified that he read *Miranda* warnings to Appellee and that these warnings were verbatim from a card. The detective further stated that, when he finished reading the warnings, he asked Appellee if he understood the rights that were read, and Appellee responded, “Yes,” and nodded his head. The detective also testified that he asked Appellee if he was willing to talk to him, and Appellee said he was willing to and started talking about what happened.

The prosecutor then asked if the detective ever promised Appellee anything in exchange for his statement. Detective Garcia responded, “No.” A few questions later, the prosecutor asked, “[D]id you threaten him in any way or coerce him in any way to talk to you about both the offenses that you were investigating and the offenses he’d already been arrested for?” Again, Detective Garcia answered, “No.” The prosecutor followed up: “Did it seem, based on your communication with him, that he was voluntary—voluntarily telling you all of these things?” Detective Garcia responded, “Correct.” The prosecutor also asked if the detective talked to Appellee about “making any kind of deal down the road or making a call on his behalf or anything like that,” and Detective Garcia responded, “No.”

After Detective Garcia finished testifying, the State tendered the Court's file, which included the arraignment forms.

4. Defense's Case

After the State rested, defense counsel had the first four minutes of the first interview played for the trial court. After the video segment was played, the following colloquy occurred:

[DEFENSE COUNSEL]: Can we stop it there? Can we back up to 3:37:45 and play to 51 again? Judge, this is where the defendant says he doesn't—it's not the language barrier. It's where he doesn't understand his rights.

THE COURT: Okay.

[PROSECUTOR]: Can I start it there?

[DEFENSE COUNSEL]: That's fine. Yeah, that's fine. (Video playing.)

THE COURT: He said he didn't—"I don't understand."

[DEFENSE COUNSEL]: He says, "I don't understand." We can stop it there. I rest.

THE COURT: Okay. The question was, "You want to talk to me?" "I don't understand."

[DEFENSE COUNSEL]: Yes, sir.

[PROSECUTOR]: The question actually was, "You willing to talk to me and try to figure this all out?" He says, "It's because I do not understand."

THE COURT: "Because I do not understand."

[DEFENSE COUNSEL]: Does not understand.

THE COURT: Uses the word "because"?

[PROSECUTOR]: He says, "It's 'cause."

THE COURT: “It’s ‘cause.”

[PROSECUTOR]: After the question, “Do you understand?” Then he nods in the affirmative. Then it’s the “figure out” part.

THE COURT: Okay.

[DEFENSE COUNSEL]: And we rest, Judge.

THE COURT: Okay.

[PROSECUTOR]: State closes.

[DEFENSE COUNSEL]: And we close.

5. *Defense’s Suppression-Hearing Argument*

Defense counsel began his argument to the trial court by saying, “We’re not talking about a language barrier. We’re talking about whether or not the defendant understands his rights and the consequences of waiving them.” Defense counsel then suggested that, in the first interview, Appellee did not know English well enough to understand his *Miranda* rights and to intelligently waive them:

After the rights are read in English, he indicates that he doesn’t understand English well enough to go over the legal parts, and so the officer has him read the card in Spanish, which he does. When he reads the card in Spanish, the officer proceeds and asks him if he understands. The defendant clearly, when he refers to, “I don’t understand,” is referring to the waiver of his rights and the consequences of waiving them. And under *Moran vs. Burbine*, that is a lack of awareness of—you can’t waive your rights if you don’t have a full awareness of the nature of the right being abandoned and the consequences of doing so.... We have him expressing he doesn’t understand In this case, the defendant expressed the fact that he did not understand the rights that he was waiving Judge Richter wrote the opinion saying that you have to have an unequivocal expression of a waiver under the

amendment. And in this case, the defendant did say he didn't understand, so that's factually different.

Defense counsel then contended that this lack of understanding necessarily carried over to the second interview:

Now, that applies to the second confession in the following way: My client didn't gain an understanding of what he was doing under the Constitution in the intervening hours between confession 1 and confession 2. So the *Miranda* warnings given by the second detective don't cure the problem that we had from the first.

Defense counsel also claimed that the statements in the second interview were inadmissible because Appellee asked for an appointed attorney at his arraignment (which occurred between the two interviews), and the police reinitiated contact with him in violation of the Sixth Amendment right to counsel:

We also move to suppress the confession because this confession was taken after my client was arraigned on all of the robberies that were discussed My client, when he was arraigned, expressed that he wanted a lawyer. He checked the box, said, Yes, I do want a court appointed lawyer. At the time he was arraigned, that's a critical stage of the prosecution The rationale for this is that once the right to counsel attaches under the Sixth Amendment, the defendant's afforded more protections because now he's expressing the idea that, I do not want to deal with the State any further except through counsel. Because the entire equation has now been changed. He's not—no longer under investigation. He has now been charged and brought over and arraigned. And he asks for a lawyer, and a lawyer was appointed. The reason we go to the trouble of appointing a lawyer right away is so the Sixth Amendment rights attach. This is no longer just a Fifth Amendment problem. Now it's a Sixth Amendment problem Under the circumstances we have, the police cannot reinitiate contact with the defendant after he has been interviewed and after he has been arraigned and appointed a lawyer. The second interrogation took place after [an

attorney^{7]} was appointed, after the critical stage had begun. And they just can't do that.

Summing up his claims, defense counsel stated, “And we request that you suppress the second confession on those two bases. Number 1, it was made without full awareness, which is the fruit of the poisonous tree from the first interrogation; and number 2, because the Sixth Amendment was clearly violated in attaining this second confession.”

6. State's Suppression-Hearing Argument

The prosecutor first argued that Appellee's responses in the second interview showed that he understood his rights:

I'll address the first issue with regard to the defendant's motion under 38.22 and 38.23. First, Your Honor, with regard to whether or not the statement was given voluntarily, as you could see from the statement in question, the one and the only one we are trying to admit as evidence in this case, we are talking about when the officer read to him his *Miranda* warnings, his response to, “Do you understand the rights I have read to you” was a nod of his head in the affirmative and to say, “yes.” That, as he pointed out, Justice Richter has found in the past to be unequivocal. And he did at that point voluntarily waive his rights and agree to speak with counsel—or excuse me, agree to speak with the detective Once again he does confirm by nodding his head and saying yes, that he does understand those rights.

The prosecutor also pointed out that, in addition to being informed of his rights in the first interview, Appellee was also informed, a second time, at the arraignment by a magistrate. And the prosecutor also contrasted the conditions of the first and

⁷ This was the attorney who declined representation.

second interview to explain how Appellee's understanding of his rights could have differed at those two times:

Your Honor, he was brought in to custody August 10th in the wee hours of the morning. And you saw from his statement on August 11th that he had been drinking for a week, that he had been smoking marijuana, that he had been partaking in cocaine for the first time. So any of his statements or what—where his mental state was when he was given the rights in English and again in Spanish have no bearing on what he understood when he was given those rights 48 hours later after a long period of sobriety in the jail. So we believe that to the first point, Kevin Castaneda-Nieto, when he sat down voluntarily with the detective on August 11th, did understand his rights, did knowingly waive those rights and did agree to speak voluntarily. Understanding that he did have the right to say, “I want my lawyer to be with me,” understanding that he did have the right to remain silent and understanding that he could have ended that at any point in time, knowing those rights, he waived those rights and agreed to speak with the detective voluntarily.

The prosecutor and the defense also argued back and forth on the claim that a Sixth Amendment right-to-counsel violation had occurred because the police reinitiated contact with the defendant after he had requested counsel at arraignment.

7. Trial Court's Ruling and Reconsideration

The trial court granted the motion to suppress. The State filed a motion for reconsideration on the basis of *Montejo v. Louisiana*, 556 U.S. 778 (2009). The State's argument was that *Montejo* defeats Appellee's Sixth Amendment claim. The trial court granted reconsideration to hear the State's argument. Defense counsel argued that the case did not apply because state caselaw still applied and statutory law (article

38.22) was stricter than the Sixth Amendment. The trial court reaffirmed its original ruling granting the motion to suppress.

C. Appeal

1. Initial Court of Appeals' Opinion (Castanedanieto I)

The court of appeals concluded that the trial court could have based its suppression ruling “in part on the continued behavior of law enforcement figures declaring to [Appellee] that he would speak to them in the interrogation setting.” *Castanedanieto I*, 2019 WL 4875340, at *3. The appellate court found that the evidence supported an inference that two declarative statements made by Detective Thayer in the first interview “set the tone for an expectation that [Appellee] would speak to authorities that overbore [Appellee’s] will and made his statements involuntary.” *Id.* The court of appeals characterized Detective Thayer as “going through the motion of providing *Miranda* warnings in English and Spanish.” *Id.* The court found that Appellee expressed hesitation about his rights by acts and words, and it criticized Detective Thayer for failing to elicit any verbal or nonverbal assent from Appellee to waiving his *Miranda* rights. *Id.*

The court of appeals also concluded that Detective Garcia, though to a lesser extent, “declared” to Appellee that he would talk. *Id.* The court further found it significant that Detective Garcia reminded Appellee of the prior interrogation and confession, “suggesting he may have more to tell the second time around.” *Id.* The

court of appeals found this reference to give the trial court sufficient basis to conclude that Appellee's confession "was motivated, if only in part, by so-called cat-out-of-the-bag thinking." *Id.*

The court of appeals then discussed *Sterling v. State*, which set forth factors to be considered when determining whether an earlier confession's illegality tainted a later confession. *Id.* at *4 (citing 800 S.W.2d 513 (Tex. Crim. App. 1990)). The court of appeals contrasted the present case with *Sterling* by pointing out that *Sterling's* motion to suppress was denied by the trial court but Appellee's was granted. *Castanedanieto I*, 2019 WL 4875340, at *4. The court of appeals emphasized that the trial court had wide discretion and concluded that the videos of the interviews did not contain indisputable evidence contrary to the exercise of that discretion. *Id.* And focusing on the video of the second interview, the court of appeals said that nothing in it demonstrated that Appellee "was not under the influence of the detectives' declarations that he would speak to them or that he was not motivated at least in part by cat-out-of-the-bag thinking." *Id.*

The court of appeals also noted the Supreme Court case of *Oregon v. Elstad*, which held that there was no presumption that an earlier confession taken without *Miranda* warnings would cause a later confession in compliance with *Miranda* to become involuntary. *Id.* at *5 (citing 470 U.S. 298 (1985)). But the court concluded that *Elstad* did not change the appellate court's job to review the trial court's ruling

for an abuse of discretion and that the case did not require an appellate court to “reweigh the facts in a way that may warrant a conclusion that denying the motion was possible.” *Castanedanieto I*, 2019 WL 4875340, at *5.

Concluding that the trial court did not abuse its discretion in granting the motion to suppress, the court of appeals affirmed. *Id.*

2. Court of Appeals’ Opinion on Remand (Castanedanieto III)

This Court granted the State’s petition for discretionary review on February 12, 2020. On September 16, 2020, the Court reversed the court of appeals’ decision and remanded the case for further analysis. *Castanedanieto II*, 607 S.W.3d at 330 (“The court of appeals has not addressed the theories of law that [Appellee] presented to the trial court.”). On remand, the court of appeals again affirmed the trial court’s ruling. *Castanedanieto III*, 2021 WL 972901, at *1, 7.

The court of appeals recognized this Court’s conclusion that “[Mr. Castanedanieto’s] legal theories were of the sort that do not involve a traditional ‘taint’ analysis,” but nonetheless concluded that “the record shows the circumstances here allowed for application of the exception to the ‘ordinarily’ applicable rules regarding *Miranda* and article 38.22.” *Id.* at *6 (quoting *Castanedanieto II*, 607 S.W.3d at 328-29). The court concluded that the record supported a reasonable inference of police awareness of Appellee’s stated lack of understanding as to his rights in the first interview and held as follows:

Yet Detective Garcia proceeded to initiate a second interview that he specifically described to Mr. Castanedanieto as being based on what was said in the first interview, thus necessarily implying, prior to giving any warnings in the second interview, that everything previously said by Mr. Castanedanieto—a young immigrant with limited education—could already be properly used against him. On this record, to the extent the trial court inferred an effort to undermine Mr. Castanedanieto’s rights, we cannot conclude such an inference was unreasonable. *See Carter*, 309 S.W.3d at 41 (applying “appropriately deferential standard of review” to trial court’s determination of whether two-step police interrogation attempted to undermine *Miranda*).

Castanedanieto III, 2021 WL 972901, at *6. The court disagreed with the State’s assertion that “there was no indication that Appellee would not have given that confession but for the fact that he gave the first one” and that any lack of understanding in the first interview did not affect the second statement. *Id.* at *7. The court found that Detective Garcia’s reference to “the former, improperly-obtained confession as having already irreversibly established the background and starting point for the present interview came before Detective Garcia conveyed any *Miranda* and article 38.22 warnings.” *Id.* Thus, the court concluded that the trial court had sufficient basis to conclude Appellee’s second confession was motivated, at least in part, by so-called “cat out of the bag” thinking. *Id.* According to the court, “this same analysis demonstrates how Mr. Castanedanieto’s lack of understanding of his rights in the first interview ‘carried over into the second interview.’” *Id.* (quoting *Castanedanieto II*, 607 S.W.3d at 326).

The court of appeals noted that in *Elstad*, “the Supreme Court walked back its recognition of the ‘cat out of the bag’ theory as a basis for excluding confessions.” *Castanedanieto III*, 2021 WL 972901, at *7 (citing *Elstad*, 470 U.S. at 314). The court

concluded, however, that “nothing in *Elstad*’s language requires reversal of a grant of suppression under these circumstances simply because the facts could be reweighed to possibly warrant a conclusion denying the suppression motion.” *Id.* The court of appeals concluded there was evidence to support a determination that Appellee “was motivated at least in part by ‘cat out of the bag’ thinking, and nothing in the second video indisputably demonstrates he was not.” *Id.* (citing *Sterling*, 800 S.W.2d at 519).

Therefore, the court of appeals determined that the trial court did not abuse its discretion by granting Appellee’s motion to suppress his second statement and affirmed the trial court’s order. *Id.*

SUMMARY OF ARGUMENT

Appellee argued in the trial court that he did not understand his rights in his first police interview and that his lack of understanding carried over to his second interview. This Court previously held that Appellee’s legal theories do not involve a traditional “taint” analysis. Thus, by applying the “cat out of the bag” coercion theory to Appellee’s claim, the court of appeals has failed to properly examine the legal theories Appellee advanced in the trial court. The ordinarily applicable rules for examining a waiver of a defendant’s rights under *Miranda* and article 38.22 govern this case and should be applied by the court of appeals.

ARGUMENT

Ground for Review, Restated: This Court previously explained that the legal theories raised by Appellee at the suppression hearing do not involve a traditional “taint” analysis. Accordingly, the court of appeals erred by applying the “cat out of the bag” legal theory instead of the ordinarily applicable rules for examining a waiver of a defendant’s rights under Miranda and article 38.22.

A. Standard of Review and Applicable Law

Appellate courts review a trial court’s ruling on a motion to suppress under a bifurcated standard of review. *Brodnex v. State*, 485 S.W.3d 432, 436 (Tex. Crim. App. 2016); *Guzman v. State*, 955 S.W.2d 85, 87-90 (Tex. Crim. App. 1997). The trial court’s factual findings are reviewed for an abuse of discretion, but the court’s application of the law to the facts is reviewed de novo. *State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018). When the trial court does not enter findings of fact and conclusions of law, the reviewing court should presume the trial court made implicit findings that supported the ruling, as long as those findings are supported by record evidence. *State v. Ross*, 32 S.W.3d 853, 855-56, 859 (Tex. Crim. App. 2000). The trial court’s ruling must be upheld if it is reasonably supported by the record and correct under any applicable theory of law. *Wade v. State*, 422 S.W.3d 661, 667 (Tex. Crim. App. 2013). To be an applicable theory of law, the appealing party must have had an adequate opportunity to develop a complete factual record with regard to that theory in the trial court. *Castanedanieto II*, 607 S.W.3d at 327.

The State has the burden of showing that a defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. *Miranda*, 384 U.S. at 475. The State must prove waiver by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986). A waiver need not assume a particular form and, in some cases, a “waiver can be clearly inferred from the actions and words of the person interrogated.” *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). Only if the “totality of the circumstances surrounding the interrogation” reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the defendant has waived his *Miranda* rights. *Joseph v. State*, 309 S.W.3d 20, 25 (Tex. Crim. App. 2010). Thus, a waiver has two distinct dimensions: one of coercion and one of understanding. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Understanding—knowing and intelligent—requires that the waiver “have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Id.*

The test for voluntariness is whether the confession is the product “of an essentially free and unconstrained choice by its maker.” *State v. Terrazas*, 4 S.W.3d 720, 723 (Tex. Crim. App. 1999) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) and *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995) (en banc)). Article 38.21 of the Texas Code of Criminal Procedure provides that an accused’s statement may be used against him “if it appears that the same was freely and voluntarily made without compulsion or persuasion.” Tex. Code Crim. Proc. Ann. art. 38.21. “The determination of whether a confession is voluntary is based on an examination of the

totality of circumstances surrounding its acquisition.” *Wyatt v. State*, 23 S.W.3d 18, 23 (Tex. Crim. App. 2000) (quoting *Penry v. State*, 903 S.W.2d 715, 744 (Tex. Crim. App. 1995)).

B. Applicable Facts

In this case, Appellee requested “a hearing prior to the introducing of any statements allegedly made by the Defendant, either orally or in writing, to determine the admissibility of same.” (CR1: 58; CR2: 57). During the suppression hearing, his counsel argued that in the first police interview, Appellee clearly did not understand his rights or the consequences of waiving them because he stated, “I don’t understand.” (RR: 35). Thus, counsel argued his client lacked full awareness of his rights. (RR: 37). Concerning the second interview, he argued that this lack of awareness carried over from the first confession to the second: “My client didn’t gain an understanding of what he was doing under the Constitution in the intervening hours between confession 1 and confession 2. So the *Miranda* warnings given by the second detective don’t cure the problem that we had from the first.” (RR: 38). He also argued that because he was arraigned on the original robberies and “checked the box, said, Yes, I do want a court appointed lawyer,” his Sixth Amendment right to counsel had attached and law enforcement violated those rights when a detective re-initiated contact in the second interview. (RR: 38-39).

In response, the State noted that Appellee’s motion was pursuant to articles 38.22 and 38.23 of the Texas Code of Criminal Procedure and reiterated that the State was

only seeking to admit the second interview in which the detective read Appellee his warnings, and then he nodded and stated, “Yes.” (RR: 41-42). Furthermore, he was arraigned between the two interviews, and he was again informed of his rights in the second interview. (RR: 44). The State reiterated that it was not trying to admit or rely on the first interview because Appellee admitted he consumed alcohol and drugs earlier in the evening; instead, the State sought to admit the second interview because he knowingly waived his rights in the second interview after the effects of any intoxicants had worn off. (RR: 44-45). The trial court granted the motion to suppress and denied the State’s motion for reconsideration on Appellee’s Sixth Amendment claim. (RR: 60).

The court of appeals initially affirmed the trial court’s order based on the theory of coercion and “cat out of the bag” thinking. This Court reversed, explaining that “[t]he court of appeals resolved the appeal on a coercion theory that was not a theory of law applicable to the case,” and noting that the court of appeals had “not addressed the theories of law that [Appellee] presented to the trial court.” *Castanedanieto II*, 607 S.W.3d at 330. The Court identified Appellee’s trial theories as “(1) that Appellee did not understand the *Miranda*/Article 38.22 warnings in the first interview and that this lack of understanding carried over to the second interview, and (2) that the State violated Appellee’s Sixth Amendment right to counsel by reinitiating questioning after [he] had requested appointed counsel at arraignment.” *Id.* at 326.

In this Court’s prior opinion, the Court explained that the legal theories advanced by Appellee “were of the sort that do not involve a traditional ‘taint’ analysis.” *Id.* at

328-29. This Court noted that “in relying partially on a ‘cat out of the bag’ theory, the court of appeals used a ‘taint’ analysis,” which was inapplicable because Appellee claimed he did not understand his rights—not that he was coerced. *Id.* at 329. Indeed, while a coerced statement leads to a presumption that later statements are “fruit of the poisonous tree” and are admissible only if the taint is shown to be attenuated, a failure to comply with *Miranda* or article 38.22 gives rise to no such presumption and ordinarily does not bar statements made in a subsequent interview that does comply. *Id.* at 328.

C. Application of Law to Facts

The court of appeals again failed to properly examine the legal theories advanced by Appellee in the trial court. The record—and this Court’s prior opinion—firmly establish that coercion was not a theory of law applicable to the case. Because coercion is not an applicable legal theory, the court of appeals should have examined Appellee’s second statement under the ordinarily applicable rules regarding *Miranda* and article 38.22. The court failed to do so. Instead, the court of appeals declared that while this Court “stated in its opinion that ‘[Mr. Castanedanieto’s] legal theories were of the sort that do not involve a traditional ‘taint’ analysis,’” “the record shows the circumstances here allowed for application of the exception to the ‘ordinarily’ applicable rules regarding *Miranda* and article 38.22.” *Castanedanieto III*, 2021 WL 972901, at *6 (quoting *Castanedanieto II*, 607 S.W.3d at 328-29). The court then went on to conclude that evidence in the record supports “a determination that Mr. Castanedanieto was

motivated at least in part by ‘cat out of the bag’ thinking, and nothing in the second video indisputably demonstrates he was not.” *Id.* at *7.

The court of appeals continued to improperly apply the “cat out of the bag” theory to the facts in this case, but the United States Supreme Court has confirmed this theory is of limited value, and this Court has rejected this theory on the facts or found it “not determinative” in multiple cases. *See Oregon v. Elstad*, 470 U.S. 298, 314 (1985); *Griffin v. State*, 765 S.W.2d 422, 428 (Tex. Crim. App. 1989); *Bell v. State*, 724 S.W.2d 780, 793 (Tex. Crim. App. 1986).

Making a confession under circumstances that preclude its use does not “perpetually disable[] the confessor from making a usable one after those circumstances have been removed.” *Griffin*, 765 S.W.2d at 428 (quoting *United States v. Bayer*, 331 U.S. 532, 541 (1947)). Neither this Court nor the United States Supreme Court have “held that the psychological impact of the voluntary disclosure of a guilty secret qualifies as State compulsion or compromises the voluntariness of a subsequent informed waiver” of the right to remain silent. *Griffin*, 765 S.W.2d at 429 (quoting *Elstad*, 470 U.S. at 312). The effect of giving a statutorily inadmissible statement on the voluntariness of a subsequent statement is determined from the totality of the circumstances, with the State bearing the burden of proving voluntariness by a preponderance of the evidence. *Griffin*, 765 S.W.2d at 429-30; *Horton v. State*, 78 S.W.3d 701, 706 (Tex. App.—Austin 2002, pet. ref’d).

The rationale of this Court’s decision in *Griffin v. State*, and its federal predecessors *United States v. Bayer* and *Oregon v. Elstad*, is that there is no presumption mandating the precise inferential leap made by the court of appeals in this case. Instead of inferring that a defendant gave a second statement because he felt he had nothing to lose since he already gave the first statement, there must be evidence in the record that a defendant would not have given the second statement but for the earlier one. *See Griffin*, 765 S.W.2d at 431. But police coercion was not a complaint Appellee made in the trial court. Thus, the court of appeals decided this case in a manner that conflicts with this Court’s direct order to address the legal theories Appellee advanced at the suppression hearing—namely, his claim that he did not understand the warnings that were given pursuant to *Miranda* and article 38.22 and his claim of an alleged violation of his Sixth Amendment right to counsel. These theories of law have been thoroughly briefed to the court of appeals, and the law applicable to these issues is also clear.

While this Court previously declined to opine on whether the State would prevail against Appellee’s lack-of-understanding claim, the Court provided useful guidance for how the claim should be addressed. In doing so, the Court listed the factors that “largely blunted” any incentive for the State to introduce evidence regarding the circumstances surrounding the first interview:

First, as we have just discussed, in assessing compliance with *Miranda* or Article 38.22, an interview typically stands on its own. Second, the record as it stood provided an obvious explanation for concluding that there was no carry-over of any confused mental state on Appellee’s part from first interview to the next. The first interview occurred in the wee

hours of the morning after Appellee had used drugs. The second interview occurred almost two days later, in the evening, after Appellee had eaten. Third, Appellee's rights had been explained to him previously by a magistrate. The second interview would have been the third occasion for [him] to hear his rights and the second one to do so after having the opportunity to sleep and have the effects of drugs wear off.

...

That would all change if Appellee's claim had been that Detective Thayer coerced his participation in the first interview. Coercion would carry a presumptive taint that the State would have to show was attenuated.

Castanedanieto II, 607 S.W.3d at 329.

Under controlling precedent from this Court—including the Court's guidance in its earlier decision in this case—and relevant caselaw from the United States Supreme Court, a prior non-compliant statement does not taint a later compliant statement. See *Castanedanieto II*, 607 S.W.3d at 328; *see also Bayer*, 331 U.S. at 541; *Griffin*, 765 S.W.2d at 428. Rather than properly determining the effect of giving a statutorily inadmissible statement and the voluntariness of a subsequent statement from the totality of the circumstances, the court of appeals inferred that Appellee gave a second statement because he felt he had nothing to lose since he already gave the first statement. In doing so, the court ignored this Court's prior opinions explaining that there must be evidence in the record that a defendant would not have given the second statement but for the earlier one. *See Griffin*, 765 S.W.2d at 431. Appellee's second interview should be examined under the ordinarily applicable rules for analyzing a subsequent interview after a prior failure to comply with *Miranda* or article 38.22.

D. Conclusion

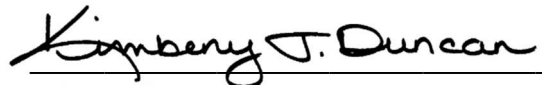
Despite this Court's guidance and a record that shows a knowing waiver of Appellee's rights in his second interview, the court of appeals failed to examine Appellee's second interview under the proper framework. Further, the court of appeals revitalized and expanded a dying doctrine by relying on "cat out of the bag" thinking to affirm the trial court's suppression order. This Court should clarify the applicability of the "cat out of the bag" doctrine in Texas, and the decision of the court of appeals should be reversed.

PRAYER

The State respectfully prays that this Court reverse the decision of the court of appeals.

John Creuzot
Criminal District Attorney
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Respectfully submitted,

A handwritten signature in black ink that reads "Kimberly J. Duncan". The signature is written in a cursive style with a horizontal line underneath it.

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CERTIFICATE OF COMPLIANCE

I hereby certify that of the foregoing brief, inclusive of all contents, is 8,751 words in length, according to Microsoft Word, which was used to prepare the brief, and that the foregoing brief complies with the word-count limit and typeface conventions required by the Texas Rules of Appellate Procedure.


KIMBERLY J. DUNCAN
Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief has been served on the Honorable Allan Fishburn, Counsel for Appellee Kevin Castanedanieto, and on the State Prosecuting Attorney, via electronic service on July 22, 2021.


KIMBERLY J. DUNCAN
Assistant District Attorney

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